

In The
Supreme Court of the United States
 October Term, 1986

JAN 23 1987
 JOSEPH F. SPANIOL,
 CLERK

AMERICAN COMMONWEALTH FINANCIAL CORPORATION, GREAT COMMONWEALTH LIFE INSURANCE COMPANY, ROBERT T. SHAW and ICH CORPORATION

Petitioners,

v.

CITY NATIONAL BANK, as Executor of the Estate of JOHN S. CANSLER, deceased, NELL V. BATES, ANNE PENDER GRIFFITH, VIRGINIA T. JOHNSON, D. LACY KEESLER, S. DEWEY KEESLER, A. H. KIMBALL, H. BROWN KIMBALL, ANN DUPREE KING, individually and as Executrix of the Estate of ROSE DUPREE KING, deceased, JOHN D. KING, MARIE DOWD LATIMER, T. F. MORGAN, GRACE E. MORGAN, MARY ROGERS PENDER MURPHY, LUDIE B. PARKER, JOHN ROBERT PENDER, III, JOHN ROBERT PENDER, IV, a minor, by his Guardian Ad Litem, JOHN ROBERT PENDER, III, MARY D. PENDER, W. L. PENDER, GAYLORD MYERS PENDER, DEBORAH GRACE SPEECE, OLIVIA BROWN THOMAS, CHARLES NIXON WHITE, DORIS HAIRE WHITE and ROGERS PENDER WILLIAMS, on their own behalf and as representatives of a class of similarly situated former shareholders of ALL AMERICAN ASSURANCE COMPANY,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF
 CERTIORARI TO THE UNITED STATES
 COURT OF APPEALS FOR THE
 FOURTH CIRCUIT

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**RESPONSE TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

Defendants' Petition for a Writ of Certiorari boils down to two incredulous and inconsistent claims. Defendants contend that (1) they have been denied their constitutional right to a jury trial, and (2) the jury's verdict, including multiple findings of fraud and violation of federal securities law, should not stand. While defendants did not want and still do not want a jury trial, that's what they got. The jury found that: defendants' tender offer, whereby defendants obtained plaintiffs' shares of All American stock, failed to disclose material facts (Issue 1); defendants' failure to disclose was done with intent to deceive, manipulate and defraud (Issue 2); defendants violated Rule 10b-13 of the federal securities law (Issue 6); defendants' acts in violation of Rule 10b-13 were done with intent to deceive, manipulate and defraud the minority shareholders (Issue 7); the minority shareholders suffered damages as result of defendants' acts in violation of Rule 10b-13 (Issue 8); a relationship of trust and confidence existed between the defendants and the minority shareholders (Issue 9); there was fraud and deceit by the defendants in connection with the purchase of the minority shares (Issue 10); the defendants' fraud or deceit was the proximate cause of damage to plaintiffs (Issue 11); the amount of damages plaintiffs are entitled to recover is \$5.28 per share sold plus interest from January 4, 1980 (Issue 12).

The District Court entered judgment consistent with the jury verdict, and defendants appealed to the Court of Appeals for the Fourth Circuit. The Fourth Circuit af-

firmed the Trial Court's judgment. Consistent with the jury verdict, the Record in this case confirms defendants' numerous acts of manipulation, misrepresentations, concealments and total abdication of their fiduciary obligations, as majority and controlling shareholder with admittedly "absolute control." Both the District Court and the Fourth Circuit have carefully examined defendants' contentions and the Record and sustained the jury verdict because it is thoroughly supported by the evidence. The opinions of the District Court and Fourth Circuit deal with all the contentions raised by defendants and find each contention to be meritless.

Defendants' contention that the Trial Court expanded Rule 10b-13 to pre-tender private purchases misstates the Record. The Trial Court and the Fourth Circuit adopted the legal position espoused by defendants that Rule 10b-13 does not apply to pre-tender purchases, but both Courts recognized that, contrary to defendants' factual allegation, there was substantial evidence that the Post Trust transaction did not occur until after the tender offer was published or otherwise made known to holders of the stock in direct violation of the express language of Rule 10b-13. Neither the District Court nor the Fourth Circuit relied on any strained interpretation of federal law or state law, but simply on the jury's finding on the evidence presented that the Post transaction was a direct violation of the express language of Rule 10b-13 and was made with the intent to deceive, manipulate and defraud plaintiffs.

Defendants also contend that the jury's finding of common law fraud is inconsistent with the jury's failure to find that defendants' omissions in the tender offer, while

material and made with intent to deceive, manipulate and defraud, would have actual significance under the circumstances of the case to a reasonable shareholder. This case involves much more than omissions in a tender offer. There were multiple manipulations and misrepresentations as documented in the Record, including the fraudulent Post deal as specifically found by the jury, any of which was more than sufficient to support the jury's verdict of common law fraud. Once the jury found a fiduciary relationship and that the fiduciary relationship was breached, liability existed under North Carolina common law.

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CONCLUSION

Defendants' Petition should be denied because:

1. Defendants' Petition calls for the United States Supreme Court to reconsider factual issues that were properly treated by the District Court and the Fourth Circuit and resolved against defendants by the jury.
2. The Trial Court and the Fourth Circuit decisions do not conflict with the decision of any other federal court, have not decided a federal question in a way that conflicts with the decision of any other federal court or state court of last resort, nor depart from the accepted and usual course of judicial proceedings.

3. Defendants' Petition is totally without merit and is filed solely in an attempt to delay payment of the judgment.

Respectfully submitted,

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